

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF RICHFIELD
HOUSING AND REDEVELOPMENT AUTHORITY

In the Matter of the Business Relocation
Claims by Walser Buick/Isuzu (WBI) and
Motorwerks, Inc. (BMW)

ORDER ON PETITIONS FOR
RECONSIDERATION
AND REHEARING

On February 25, 2004, Respondent Richfield Housing and Redevelopment Authority (HRA) filed a Petition for Reconsideration. Claimants Walser Buick/Isuzu (WBI) and Motorwerks, Inc. (BMW) filed a response to Respondent's Petition for Reconsideration and also filed their own Petition for Reconsideration and Rehearing on February 27, 2004. The Respondent filed a Memorandum in Opposition to the Claimants' Petition for Reconsideration and Rehearing on March 10, 2004. The Claimants filed a response on March 11, 2004.

The Richfield HRA is represented by Robert J.V. Vose, Esq., Kennedy & Graven, 200 South Sixth Street, Suite 470, Minneapolis, MN 55402. The Claimants WBI and BMW are represented by Kirk Schnitker, Esq. and John Morphey, Esq. of the firm of Schnitker and Associates, P.A., 2300 Central Avenue NE, Minneapolis, MN 55418.

Based upon the filings of the parties, the record in this matter, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED that:

1. Claimants' Petition for Reconsideration or Rehearing of the determination that the architect's fees are capped at \$10,000 as reestablishment expenses is DENIED.
2. Claimants' Petition for Rehearing on the determination that its employee time spent planning for the move of personal property was not reimbursable is GRANTED to the extent that the record will be reopened to take the testimony of Ron Fanin by telephone.
3. Respondent's Petition for Reconsideration of the determination of interest to be awarded is DEFERRED.

Dated this 18th day of March 2004.

/s/ George A. Beck
GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

This matter does not arise under the Administrative Procedure Act, however the rules of the Office of Administrative Hearings adopted under the APA provide some guidance as to when a Petition for Reconsideration should be granted. Minn. Rule pt. 1400.8300 F. provides that the ALJ shall grant reconsideration or rehearing if the decision is not justified by the evidence or is contrary to law and to deny the motion would be inconsistent with substantial justice. The claimants seek reconsideration of the ALJ's determination that certain architectural design and engineering fees were reestablishment expenses capped at \$10,000. They note that the architect testified at the hearing that \$70,812 of his fees related to redesign of the facility to accommodate personal property such as layout for the showroom floor, sales stations and the parts department. The claimants also argue that a federal highway administration official, Ron Fanin advised Mr. Donahue, the HRA's consultant, that fees for redesign to accommodate a piece of equipment that was moved would be reimbursable. They therefore believe that since not all of the architect's fees were for general build out, they should not be capped at \$10,000.

In its reply to the Petition the HRA points out that the relevant rule, 49 CFR § 24.304(a)(2), does not distinguish between fees for general building design and fees for building design related to personal property. Rather, reestablishment expenses, which are capped at \$10,000, specifically include "modifications to the replacement property to accommodate the business operation or make replacement structures suitable for conducting the business." And 49 CFR § 24.305(j) provides that a business is not entitled to payment for physical changes to the real property at the replacement location except as provided in § 24.304(a). The ALJ was unable to conclude that the architect and design fees were anything but fees incurred for the modification of the replacement property, to make replacement structures suitable for conducting the business. Since they fit squarely within the definition, they are capped at \$10,000 and cannot be construed to be services for planning the move of personal property. Additionally, Mr. Donahue's recollection of what Mr. Fanin told him does not constitute reliable hearsay nor does it appear clear that Mr. Donahue's testimony suggested allowing this expense. This Request for Reconsideration must therefore be denied.

The Claimants also seek in the alternative that they be granted a rehearing on the issue of architectural services. However the only reason advanced is that the ALJ made a mistake in interpreting the evidence and testimony and/or the ALJ's decision is not justified by the evidence. Since this request merely restates the Request for Reconsideration stated above and does not argue that new evidence must be presented, it must also be denied.

The Claimants have also petitioned for a rehearing on the issue of whether or not they are entitled to relocation benefits for the time its employees spent planning for the move of its personal property. In the February 17, 2004 Order the ALJ interpreted professional services necessary for planning the move of personal property to allow only the reimbursement fees paid to a professional planner, apart from the displaced business. The Claimants did not retain professional move planners but rather used employee time for the planning. The ALJ noted that an affidavit by a paralegal relaying information received from an employee of the Federal Highway Administration on a crucial issue was not sufficiently reliable upon which to base a finding. The Claimants point out Mr. Vose's affidavit does not directly contradict that of the paralegal, however the paralegal's affidavit was contradicted by Mr. Donahue's testimony. By affidavit, counsel for the Claimants states that Mr. Fanin would testify that premove professional planning costs are reimbursable even if performed in-house by the employees of the business being displaced and not by an outside contractor.^[1] Mr. Fanin is apparently willing to testify if the matter is reopened.

The HRA points out that the Claimants could well have called Mr. Fanin as a witness at the hearing originally. Additionally, it is not clear that even if Mr. Fanin testifies as indicated by the Claimants, that it would necessarily change the outcome of this case. Neither is it clear what if any deference should be accorded to Mr. Fanin's interpretation of the federal regulation. Nonetheless, there is clearly an unresolved conflict in the record as to Mr. Fanin's interpretation of the regulation allowing reimbursement for professional planning services. And it now appears that Mr. Fanin is available for testimony. There is no indication of misconduct here, but it is possible that the Claimants believed Mr. Fanin's interpretation on this issue would not be vigorously challenged. The record will therefore be reopened for the sole purpose of taking Mr. Fanin's testimony under oath by telephone at a time and date to be promptly arranged by counsel for the Claimants. Given the amount in controversy here it is important to have a full administrative record, including the position of the lead federal agency on this issue.

Since the interest determination is dependent upon the amount of benefits awarded, a decision on the HRA's Petition for Reconsideration is deferred.

G.A.B.

^[1] The HRA objected to the affidavit as "new evidence." It is not received as evidence in this case, however, but only as an indication of what Mr. Fanin might say if allowed to testify.